Child N & Anor v Dr Abirami Kunaseelan & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21 NCvC-109–11 OF 2020
ROZ MAWAR JC
17 APRIL 2023

Tort — Damages — Assessment — Medical negligence — First plaintiff suffered severe irreversible brain damage at birth — Admission of liability by defendants — Special damages — General damages — Future general damages — Multiplier for future general damages — Aggravated damages — Claim for costs and out-of-pocket expenses — Claim for interest on damages awarded — Power of court under O 76 r 12 of Rules of Court 2012 — Principles in deciding quantum of damages — Whether plaintiffs entitled to compensatory damages due to defendants' negligence — Rules of Court 2012 O 76 r 12

The first plaintiff had suffered severe and irreversible brain damage at birth due to a delayed decision by the defendants to conduct an emergency Caesarian procedure on the first plaintiff's mother ('the second plaintiff') despite earlier detection that the first plaintiff in utero had showed the signs and symptoms of bradycardia. Specifically, the first plaintiff suffered Spastic Quadriplegic Cerebral Palsy secondary to hypoxic-ischemic encephalopathy with a developmental milestone of less than three months old. Consequent upon these tragic circumstances, the second plaintiff had suffered an exacerbation of her major depressive disorder which required her to take Vortioxetine daily and to undergo therapy and counselling. The High Court had recorded a consent judgment that confirmed the admission of liability by the defendants for all the plaintiffs' claims. The present case was in relation to the assessment of damages to be awarded to the plaintiffs.

Held:

(1) The award of damages was final and not susceptible to review in the future. The court held that the plaintiffs were entitled to compensatory damages for the defendants' negligence which could not be reduced on the basis that the plaintiffs could obtain, and the defendants could provide free medical care. Especially so when the second plaintiff's leave without pay would end in another year and if the current circumstances still subsisting whereby the first plaintiff needing around-the-clock care, the second plaintiff might need to resign from the civil service. The purpose of the award for damages was to compensate the plaintiffs for the loss or suffering caused by the negligence of the defendants. In deciding the quantum, the court adhered to the principles that the plaintiffs' loss

was not the expenditure of money to buy the special formula, customised equipment, or the medicines and therapies. The plaintiffs' loss was the existence of the need for them, the value of which was the proper and reasonable amount of supplying those needs (see paras 3–6).

(2) With respect to special damages, the court had awarded the total sum of RM209,172 to the plaintiffs. For general damages, the court awarded RM500,000 to the first plaintiff and RM114,000 to the second plaintiff. Both the plaintiffs were awarded aggravated damages in the sum of RM350,000. For future general damages, the first plaintiff was awarded a total sum of RM6,954,156 for forty years (based on the first plaintiff's life expectancy of 44 years minus her current age of four years old). The court found that this was a reasonable amount because on average her care amounted to RM173,853.90 per year. As for costs, considering that the present action took 29 months to complete and the claim could have been settled even before the filing of this action because the defendants had in their possession and knowledge of the internal findings, the court awarded RM150,000 as the costs for the first plaintiff and RM50,000 for the second plaintiff. The court further allowed the plaintiffs' claim for out-of-pocket expenses of RM15,177.25 (see paras 39 & 60–65).

(3) The court granted the interest of 4% to be calculated on special damages of RM209,172 from 17 March 2019 (the first plaintiff's date of birth) to the date of admission of liability on 28 January 2022. Further, the court granted the interest of 5% to be calculated on general damages for pain and suffering and loss of amenities of life and aggravated damages that totaled to RM964,000 from the filing of the present action on 23 November 2020 to the date of admission of liability. Lastly, the court ordered interest of 5% on the total judgment sum of future general damages which was RM6,954,156 from the date of the admission of liability to the date of payment (see paras 67–69).

(4) To ensure that the future general damages would be applied for the specific purposes as provided by the court, the court had invoked its powers under O 76 r 12 of the Rules of Court 2012. The money must be employed for the purposes of the medical needs and care of the first plaintiff. It was not meant to enrich any party or utilised for any other purpose, be it for the medical expenses of other family members. To conclude, the damages awarded might at first instance appear to be a fortune but when employed according to the court's order, it would only ensure some convenience to the first plaintiff's survival (see paras 70 & 73).

[Bahasa Malaysia summary

Plaintif pertama telah mengalami kecacatan otak yang teruk dan tidak dapat dipulihkan semasa lahir disebabkan oleh keputusan tertangguh oleh

defendan-defendan untuk menjalankan prosedur Caesarian kecemasan ke atas ibu plaintif pertama ('plaintif kedua') walaupun telah dikesan lebih awal bahawa plaintif pertama yang berada dalam kandungan telah menunjukkan tanda dan gejala bradikardia. Secara khusus, plaintif pertama mengalami Spastik Quadriplegic Cerebral Palsy sekunder kepada ensefalopati hipoksik-iskemia dengan tahap perkembangan kurang daripada tiga bulan. Akibat daripada keadaan yang menyedihkan ini, plaintif kedua telah mengalami masalah kemurungan yang lebih teruk yang memerlukannya untuk mengambil Vortioxetine setiap hari dan menjalani terapi dan kaunseling. Mahkamah Tinggi telah merekodkan penghakiman persetujuan yang mengesahkan pengakuan liabiliti oleh defendan-defendan untuk semua tuntutan plaintif-plaintif. Kes ini adalah berkaitan dengan taksiran ganti rugi yang akan diberikan kepada plaintif-plaintif.

Diputuskan:

(1) Pemberian ganti rugi adalah muktamad dan tidak terdedah kepada semakan pada masa hadapan. Mahkamah memutuskan bahawa plaintif-plaintif berhak mendapat ganti rugi pampasan atas kecuaian defendan-defendan yang tidak boleh dikurangkan atas dasar bahawa plaintif-plaintif boleh mendapatkan, dan defendan-defendan boleh menyediakan rawatan perubatan percuma. Terutama sekali apabila cuti tanpa gaji plaintif kedua akan berakhir dalam tempoh setahun lagi dan jika keadaan semasa masih wujud di mana plaintif pertama memerlukan penjagaan sepanjang masa, plaintif kedua mungkin perlu meletakkan jawatannya daripada perkhidmatan awam. Tujuan pemberian ganti rugi adalah untuk membayar pampasan kepada plaintif-plaintif bagi kerugian atau penderitaan yang disebabkan oleh kecuaian defendan-defendan. Dalam memutuskan kuantum, mahkamah berpegang kepada prinsip bahawa kerugian plaintif-plaintif bukanlah perbelanjaan wang untuk membeli susu formula khas, peralatan tersuai, atau ubat-ubatan dan terapi. Kerugian plaintif-plaintif adalah kewujudan keperluan-keperluan tersebut, yang nilainya adalah jumlah yang sesuai dan munasabah untuk membekalkan keperluan-keperluan tersebut (lihat perenggan 3–6).

(2) Berkenaan dengan ganti rugi khas, mahkamah telah memberikan jumlah keseluruhan RM209,172 kepada plaintif-plaintif. Bagi ganti rugi am, mahkamah mengawardkan RM500,000 kepada plaintif pertama dan RM114,000 kepada plaintif kedua. Kedua-dua plaintif telah diberikan ganti rugi teruk dengan jumlah RM350,000. Bagi ganti rugi am masa hadapan, plaintif pertama telah diberikan sejumlah RM6,954,156 selama empat puluh tahun (berdasarkan jangka hayat plaintif pertama selama 44 tahun yang ditolak dengan umurnya sekarang iaitu empat tahun). Mahkamah mendapati ini adalah jumlah yang munasabah kerana secara purata penjagaannya berjumlah RM173,853.90 setahun. Bagi kos, mengambil kira bahawa tindakan semasa mengambil masa

29 bulan untuk diselesaikan dan tuntutan ini sebenarnya boleh diselesaikan sebelum tindakan ini difailkan kerana defendan-defendan mempunyai dalam milikan dan pengetahuan mereka tentang penemuan dalaman, mahkamah mengawardkan RM150,000 sebagai kos untuk plaintif pertama dan RM50,000 untuk plaintif kedua. Mahkamah seterusnya membenarkan tuntutan plaintif-plaintif untuk perbelanjaan di luar poket sebanyak RM15,177.25 (lihat perenggan 39 & 60–65).

(3) Mahkamah memberikan faedah sebanyak 4% untuk dikira ke atas ganti rugi khas sebanyak RM209,172 mulai 17 Mac 2019 (tarikh kelahiran plaintif pertama) hingga tarikh pengakuan liabiliti pada 28 Januari 2022. Selanjutnya, mahkamah memberikan faedah 5% untuk dikira ke atas ganti rugi am untuk kesakitan dan penderitaan dan kehilangan kemudahan hidup dan ganti rugi teruk yang berjumlah RM964,000 daripada pemfailan tindakan semasa pada 23 November 2020 hingga tarikh pengakuan liabiliti. Akhir sekali, mahkamah memerintahkan faedah sebanyak 5% ke atas keseluruhan jumlah penghakiman bagi ganti rugi am masa hadapan iaitu RM6,954,156 dari tarikh pengakuan liabiliti hingga tarikh pembayaran (lihat perenggan 67–69).

(4) Untuk memastikan bahawa ganti rugi am masa hadapan digunakan untuk tujuan khusus seperti yang diperuntukkan oleh mahkamah, mahkamah telah menggunakan kuasanya di bawah A 76 k 12 Kaedah-Kaedah Mahkamah 2012. Wang tersebut mesti digunakan untuk tujuan keperluan perubatan dan penjagaan plaintif pertama. Ia tidak bertujuan untuk memperkayakan mana-mana pihak atau digunakan untuk tujuan lain, walaupun untuk perbelanjaan perubatan ahli keluarga yang lain. Sebagai kesimpulan, ganti rugi yang diberikan mungkin pada mulanya kelihatan seperti satu jumlah yang besar namun apabila digunakan mengikut perintah mahkamah, ia hanya akan memastikan sedikit kemudahan kepada kelangsungan hidup plaintif pertama (lihat perenggan 70 & 73).]

Cases referred to

Ahmad Radhiq Arbee bin Ahmad Rejal Arbee (as a husband and dependant of Sharifah Shalihah bt Sayed Abdullah, deceased) & Ors v Kerajaan Malaysia & Ors [2020] 10 MLJ 459, HC (refd)

Dr Fatin Ahya Zulkeflee & 26 Yang Lain (W01-(NCVC)(W)-230–05 of 2019) (unreported), CA (refd)

Donnelly v Joyce [1973] 3 All ER 475, CA (refd)

Henry Siang Len v Universiti Kebangsaan Malaysia & Ors (W02-(NCvC)(W)-349–02 of 2019) (unreported), CA (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (folld)

Jag Singh v Toong Fong Omnibus Co Ltd [1964] 1 MLJ 463, PC (refd)

Kasirin Kasmani v The Official Administrator & Anor [1991] MLJU 22; [1991] 2 CLJ Rep 800, HC (distd)
Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v Ahmad Thaqif Amzar bin Ahmad Huzairi (claiming through mother and her litigation representative, Majdah bt Mohd Yusof) and other appeals [2023] 1 MLJ 281, CA (refd)
Liong Thoo v Sawiyah & Ors [1982] 1 MLJ 286 (refd)
Norwich Pharmacal Co and others v Commissioners of Customs and Excise [1973] 2 All ER 943, HL (refd)
Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors [2019] 12 MLJ 741; [2019] 9 CLJ 246, HC (refd)
Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors [2014] MLJU 1922; [2015] 1 CLJ 825, HC (refd)
Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (suing through his wife and litigation representative Wan Zafura bt Wan Kassim) and another appeal [2022] 4 MLJ 529; [2002] 2 CLJ 173, CA (folld)
Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals [2017] 4 MLJ 102, CA (refd)
Tan Cheong Poh & Anor v Teoh Ah Keow [1995] 3 MLJ 89, CA (refd)
Totham v King's College Hospital NHS Foundation Trust [2015] EWHC 97 (QB), QB (refd)
Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292, FC (refd)
Yap Sao Leong & Anor (both suing as administrators to the estate of Yap Yi Hong, deceased) v Kerajaan Malaysia & Ors [2021] MLJU 86, HC (refd)

Legislation referred to

Rules of Court 2012 O 76 r 12

Karthi Kanthabalan (with Alicia Chin) (PS Ranjan & Co) for the plaintiff.
Barath Manian (Attorney General's Chambers) for the defendant.

Roz Mawar JC:

MEDICAL NEGLIGENCE

[1] This is a tragic case where the first plaintiff suffered severe and irreversible brain damage at birth on 17 March 2019 at Hospital Selayang. The second plaintiff who had a high-risk obstetric history and was initially planned to undergo an emergency lower section caesarian section on 18 March 2019 to birth the first plaintiff.

[2] By 8pm on 17 March 2019, the first plaintiff in utero showed signs and symptoms of bradycardia. Despite detecting that, a delayed decision was made at 9.20pm for the second plaintiff to undergo an emergency Caesarian then. Nonetheless, further delay followed before the first plaintiff was delivered at

10.14pm. It was noted at birth that the first plaintiff suffered hypoxic-ischemic encephalopathy and its sequelae including severe brain damage. The second plaintiff suffered an exacerbation of her major depressive disorder:

(a) the first plaintiff suffers Spastic Quadriplegic Cerebral Palsy secondary to hypoxic-ischemic encephalopathy with a developmental milestone of less than three months old as a result of negligence due to delay instead of acting promptly and accordingly to the accepted procedures at Hospital Selayang; and

(b) on 28 January 2022 the High Court recorded a consent judgment that confirmed the admission of liability by the defendant for all of the plaintiffs claims with damages and costs to be assessed by this court. The suit against the first eight initial defendants who were the medical officers and staff of Hospital Selayang, was withdrawn with no order as to costs.

[3] On 20 February 2023 this court heard the testimony from the second plaintiff and their expert Dr Aishah Ahmad Fauzi. This court also heard the testimony of the expert witness Dr Elyana Jalil for the defendant. Their testimonies have greatly assisted this court in determining the ascertainment of damages and wherever granted, the quantum. The award of damages is final and not susceptible to review in the future no matter how the future holds for the first and second plaintiffs. The decision in *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2014] MLJU 1922; [2015] 1 CLJ 825 is referred to.

[4] This court rules that the plaintiffs are entitled to compensatory damages for the defendant's negligence which cannot be reduced on the basis that the plaintiffs can obtain and the defendant can provide free medical care. Especially so when the second plaintiff's leave without pay will end in another year and if things are as they are now with the first plaintiff needing around-the-clock care, the second plaintiff may have to resign from the civil service. Damages will compensate the plaintiffs (see *Jag Singh v Toong Fong Omnibus Co Ltd* [1964] 1 MLJ 463 and *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292).

[5] Be that as it may, in the award for general damages, aggravated damages, special damages and costs, all items of claims are scrutinised and considered. If the figures are not as per claim, this court has iterated the basis and premise to come such amount which this court deems reasonable and judicious. The award for the damages is with the aim to compensate the plaintiffs for the loss/suffering caused by the negligence of the defendant.

[6] In deciding on the quantum, this court adhered to the principles that the plaintiffs' loss is not the expenditure of money to buy the special formula,

customised equipment or the medicines and therapies. The plaintiffs' loss is the existence of the need for them, the value of which is the proper and reasonable amount of supplying those needs — *Donnelly v Joyce* [1973] 3 All ER 475, *Liong Thoo v Sawiyah & Ors* [1982] 1 MLJ 286 and *Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89 refers.

[7] Through the testimony of the second plaintiff, this court was appraised that at 36 years of age, she is currently on extended maternity leave to care for the first plaintiff. The maternity leave is for five years without pay. She worked at that very same hospital — Hospital Selayang at the Records Department earning RM2,300 monthly prior to the leave taken. She hopes to return to work to earn should there be assistance in caring for the first plaintiff. The circumstances of the first plaintiff most likely not allow her to return to the nine-to-five-job or any job with those working hours. Even with assistance, she is still required to provide care for the first plaintiff. This would mean that she would not be entitled to a pension nor avail herself to the medical facilities for civil servants. At the moment, the family gets by on her personal savings, withdrawal from her husband's Employees Provident Fund account, aid from Lembaga Zakat Selangor, a non-governmental organisation Jabatan Kebajikan Masyarakat and state government.

[8] Both the second plaintiff and her husband are the main carers for the first plaintiff. In addition to caring for the first plaintiff, the second plaintiff and her husband also care for his nine-year-old son and their seven-year-old daughter who was born with a congenital condition of lung fibrosis. The husband is a technician who has been out of work as a result of his slipped disc.

[9] The first plaintiff who is now four years old, has not grown normally and will not be normal. She needs around-the-clock care as she is unable to attend to her bodily functions herself. She requires help and care in feedings, bathing, cleaning up after herself and wiping of her saliva. Her oral hygiene needs to be cared for to avoid infection. The first plaintiff has weak muscles — she is unable to sit or stand on her own. She is unable to communicate and does not show any comprehension to her surroundings. According to the second plaintiff, the first plaintiff also does not cry.

[10] The first plaintiff needs to be fed through a tube three hourly. She also requires physiotherapy. There are days when she displays dystonia — neurological movement disorder. At the moment the first plaintiff is depended on baclofen, gabapentin and lactulose daily.

[11] The first plaintiff has had medical appointments no less than 20 times yearly. As for the therapies required, the plaintiffs obtained medical care and service as follows:

(a) Hospital Sungai Buloh (47km one way from home) for physiotherapy, occupational therapy and speech therapy;

(b) Hospital Tunku Azizah (22km one way from home) for physiotherapy and occupational therapy; and

(c) Rengan Rehab Hospital (3km one way from home) for physiotherapy and occupational therapy.

[12] The therapies at the government hospitals — Hospital Sungai Buloh and Hospital Tunku Azizah provided for appointments once in two or three months. The second plaintiff had brought the first plaintiff to Rengan Rehab Hospital once a week or once a fortnight depending on their financial status at that particular point in time. It is not disputed by experts from the plaintiffs and the defendant that the first plaintiff required the sessions to be more frequent. In fact, for some therapies, the first plaintiff is recommended to attend weekly sessions or twice a week. Although the plaintiffs can go to government hospitals, they cannot secure appointments for the frequency needed.

[13] This court accepts the fact that rehabilitative medicine would also prevent further complications and further disabilities.

[14] The purpose of the therapies is to achieve as much as possibly can, the first plaintiff to manage her basic needs herself daily. Since birth, she could not be left alone. She also has difficulty sleeping at night.

[15] The family does not have the right equipment at home. Their small apartment is also not conducive for such and to take care of first plaintiff. They claim they also need to attend to the care of their elder daughter and her medical appointments.

[16] For the first plaintiff, they have customised wheelchairs, wingchair, car seat, standing frame, gym ball, swing recommended by the specialist. The first plaintiff needs special formula milk, disposable diapers, gauze, and syringes daily.

[17] The second plaintiff takes Vortioxetine daily and goes to therapy with a psychiatrist specialist and also counselling.

Special damages

[18] This special damages is for the costs incurred by the plaintiffs for the period of 20 months — the first plaintiff was born in March 2019 and the suit was filed in November 2020.

[19] For travel expenses, the plaintiffs had pleaded a sum of RM13,632 but was prepared to accept a reduction to RM6,000. The federal counsel for the defendant calculated the receipts adduced which had only amounted to RM3,606. In her testimony, the second plaintiff had explained that due to the first plaintiffs condition and also hers, and also caring for their other two children, they were unable to keep each receipt for travel expenses.

[20] This court views that given the circumstances, with the second plaintiff having just delivered the first plaintiff and her husband helping care for the other children in addition to his own spinal cord issues, they are not expected to be able to produce every single receipt. As can be seen, it is quite a trek each time the plaintiffs set off for medical treatment and care. That fact was not challenged. This court thus awards travel expenses in the amount of RM6,000.

[21] For the costs of special equipment, this court accepts that those are the special equipment needed for the first plaintiff and provided for by the second plaintiff and her husband even though the receipts for the expenses are all not in order. Except for the air-conditioner and the water filter which amounted to RM2,300. There is no evidence that the air-conditioner and the water filter were special equipment required by the first plaintiff as a result of the defendant's negligence. The experts from both parties did not testify that this was a necessity for the first plaintiff. Thus, this court awards RM1,457.

[22] The plaintiffs sought RM4,43 for the costs of nutrition, special food, vitamins and other supplements. The defendant highlighted that the receipts for the expenses spent on them had only tallied to RM758.10. Given that the records are not complete but that this court is satisfied such costs were incurred to feed and care for the first plaintiff until now, this court awards a sum of RM4,000 which this court opines as reasonable at RM200 per month.

[23] The plaintiffs claimed RM10,000 for costs of personal care items. Again, not all of the receipts were produced. This court considered that the first plaintiff was incontinent and could not be toilet trained like normal children at the age of two. She also required more wipes and creams than that of the usual normal child due to her inability to swallow and control her saliva. This court rules that RM400 monthly is reasonable which totals to RM8,000.

[24] For the cost of therapies, this court awards the full sum of RM2,700 claimed. That would be RM135 per month.

[25] For the value of care, the fact that the first plaintiffs condition was not due to congenital is considered. The constant care resulted in the second plaintiff having to take leave with no pay. It was not denied that the first plaintiffs father had also watched over and cared for her. This court opines that

the cost valued for the care should be calculated at 75% of commercial care. This court awards it at RM3,000 monthly which amounts to RM60,000 (see *Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97 (QB) and *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102).

[26] For the cost of pre-action discovery, this court agrees with the federal counsel that it should be borne by the plaintiffs. Nevertheless, they would not have to do so if there were no negligence on the part of the defendant. This court finds that the sum of RM10,000 is reasonable and accordingly awards so. The case of *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1973] 2 All ER 943 and *Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors* [2019] 12 MLJ 741; [2019] 9 CLJ 246 refers.

[27] There are also pre-trial damages which this court awards — travel expenses until the judgment today RM8,700 and for the 29 months to the date of this judgment:

(a) the continuous cost for nutrition, special food, vitamins and other supplements at RM200 monthly that totals to RM5,800;

(b) the continuous cost for personal items at RM400 monthly that totals to RM11,600;

(c) the continuous cost of therapies at RM135 monthly that totals to RM3,915; and

(d) the cost of value of care provided by the second plaintiff and her husband at RM3,000 per month that totals to RM87,000. The total for pre-trial damages in (a)–(d) is RM117,015.

[28] Therefore, the total of special damages awarded to the plaintiffs is RM209,172. Tabulated below are the items for easy reference:

Special damages	
Particulars	RM
Travel expenses	6,000
Cost of special equipment	1,457
Cost of nutrition, special food, vitamins and other supplements	4,000
Cost of personal care items	8,000
Cost of therapies	2,700
Cost of value of care	60,000
Cost of pre-action discovery	10,000
Pre-trial continuous costs for travel expenses	8,700

Pre-trial costs for continuous expenses for nutrition, special food, vitamins and other supplements	5,800
Pre-trial costs for continuous expenses for personal care items	11,600
Pre-trial costs for continuous expenses for therapies	3,915
Pre-trial costs for continuous value of care costs	87,000
TOTAL	209,172

General damages

[29] The plaintiffs claimed RM500,000 for pain and suffering endured by the first plaintiff and also loss of amenities of life. This defendant submitted for RM300,000. Based on the precedents by the Court of Appeal in *Henry Siang Len v Universiti Kebangsaan Malaysia & Ors* (W02-(NCvC)(W)-349–02 of 2019) (unreported) and *Dr Fatin Ahya Zulkeflee & 26 Yang Lain* (W01-(NCVC)(W)-230–05 of 2019) (unreported), the figure of RM500,000 this court finds just in this case.

[30] For the second plaintiff this court awards general damages of RM114,000 as claimed. This sum includes the cost of future psychiatric treatments. The plaintiff is granted this award to enable her to improve her symptoms and minimise the impact of depression in her daily life.

Aggravated damages

[31] The submissions by the learned counsel for the plaintiffs that there was a delayed admission of guilt have aggravated the injuries suffered by the plaintiff is accepted. This court observed that the defendant could have accepted admission of liability as early as three months after the first plaintiffs birth after the conclusion of internal inquiry. The conclusion of it was that there was mismanagement in the delivery of the first plaintiff. The findings included inexcusable delay in the decision-making to undertake the emergency caesarian operation and also in performing the same. From the facts and circumstances of this case, this court finds such delays unacceptable as the position of the plaintiffs could not be reversed. Yet, the plaintiffs had to commence this action against the defendant for such medical negligence.

[32] The defendant did not admit to such liability at first instance. Defence was filed and it took some time for the admission of liability on 28 January 2022. The pain and suffering of the plaintiffs were certainly aggravated by the delay in admitting to such liability as well.

[33] The other delay in providing for the discovery of medical reports after repeated requests pursuant to a court order is also noted. There was a delay of three months from the court order to the actual time when the medical records were furnished to the plaintiff.

[34] For the assessment of damages, this court further observed during examination in court that Dr Elyana came across moments of difficulty in her professional position when the defendant tried to reduce the costs claimed. The way this case was handled can be taken into account when awarding aggravated damages (see *Ahmad Radhiq Arbee bin Ahmad Rejal Arbee (as a husband and dependant of Sharifah Shalihah bt Sayed Abdullah, deceased) & Ors v Kerajaan Malaysia & Ors* [2020] 10 MLJ 459).

[35] The arguments put forth by the federal counsel for the defendant was considered in that it was argued the defendant did not act deliberately in bad faith. The issue of delay featured from the point where the second plaintiff needed urgent medical attention, to the admission of liability when knowledge on the part of the defendant was apparent pursuant to the conclusion of the internal findings, to the provision of medical records for discovery, to the admission of liability that was recorded only on 28 January 2022, and the way assessment for damages was conducted.

[36] In the premises, this court allows a sum of RM350,000 claimed as aggravated damages collectively for the plaintiffs (see also *Yap Sao Leong & Anor (both suing as administrators to the estate of Yap Yi Hong, deceased) v Kerajaan Malaysia & Ors* [2021] MLJU 86 and *Nur Syarafina binti Sa'ari*).

Multiplier for general damages

[37] Dr Aishah, the expert for the plaintiff had testified her prediction of 44 years for the life of the first plaintiff. She had calculated this based on her examination of the first plaintiff where she had found that the first plaintiff depended entirely on the caregivers for feed and to move. The adjusted Kaplan Meier was applied, taking into account that the first plaintiff is not able to lift her head.

[38] Dr Elyana's prediction to only thirty years of age is due to the inability to examine the first plaintiff who was sleeping during the examination. But Dr Elyana agreed with Dr Aishah's conclusion that the first plaintiff is able to reach 44 years of age if she is able to reach 30 years old.

[39] This court will use the life expectancy of 44 years old for the first plaintiff. This court found that Dr Aishah had already deducted the years necessary as the first plaintiffs' life expectancy is very much lower than the

average Malaysian Malay girl. Her current age of four years is to be deducted so the multiplier for the purposes of calculating the general damages shall be 40 years or 480 months. To this, this court is guided by the court of Appeal's decision in *Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (suing through his wife and litigation representative Wan Zafura bt Wan Kassim) and another appeal* [2022] 4 MLJ 529; [2002] 2 CLJ 173.

Future general damages — Medical and therapy needs

[40] The second plaintiff is not a permanent employee of Hospital Selayang. She was unable to take her examinations to be absorbed as a permanent employee due to the birth and care of the first plaintiff. On a balance of probabilities, it is likely that she is not able to return to a nine-to-five job at Hospital Selayang to provide care for the first plaintifft even when this court will award damages for assistance. The second plaintiff would still need to provide care and undergo therapies and rehabilitative medical exercises with and for the first plaintiff.

[41] The senior counsel for the defendant argued that the costs of consultations with the following are free at government hospitals:

(1) rehabilitative physician;

(2) pediatric neurologist;

(3) pediatric orthopedic surgeon;

(4) gastroenterologist;

(5) neurologist;

(6) gynecologist;

(7) dental consultations;

(8) physiotherapists;

(9) occupational therapy;

(10) dietician;

(11) ophthalmologist; and

(12) spine orthopedic surgeon.

[42] In the same breath, the federal counsel submitted this argument also extended to the cost of surgical procedures like for tendon releases or osteotomy for limb, hysterectomy and spine stabilisation as well as hospital admissions. Reference was made to the Court of Appeal's decision in *Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v Ahmad Thaqif Amzar bin*

Ahmad Huzairi (claiming through mother and her litigation representative, Majdah bt Mohd Yusof) and other appeals [2023] 1 MLJ 281 and also *Kasirin Kasmani v The Official Administrator & Anor* [1991] MLJU 22; [1991] 2 CLJ Rep 800.

[43] The reference to the latter case this court finds misplaced as the decision therein on mitigating expenses were for past expenses and not future expenses as in this instant. This court is bound by the Federal Courts' decision in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 at p 15:

> We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judge was in line with the current practice on the strength of the decision in *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. In determining a claim for future medical treatment, be it at a private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also show that the amount claimed for such medical treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in Gleneagles, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospital/centres.
>
> Nevertheless in the present case, we found that the learned trial judge had considered the reasons advanced by the appellant in claiming for the cost for future medical treatment at the private hospital and was not persuaded to award the full cost claimed by the appellant The learned trial judge had given her reasons for awarding only one-third of the amount claimed by the appellant. We affirm the award made by the earned trial judge in this respect, but on a different ground. We found that the amount awarded by the learned trial judge was fair and reasonable, and we do not find any justification to disturb the same.

[44] Currently the first plaintiff is scheduled for follow-ups every three to six months interval for combined pediatric neurology and rehabilitation, every two to three months interval for physiotherapist and occupational therapist, and once in three months for speech therapist.

[45] This clearly is insufficient for the first plaintiff. This court accepts the unchallenged evidence of Dr Aishah for the plaintiffs in her recommendation that the first plaintiff requires medical management from a multidisciplinary team which consists of the specialists stated in para 41(1)–(12) above. This court finds that the government hospitals which the Defendant contended provide for free consultations and therapies cannot accomodate the first plaintiff's need for the frequency of the therapies and rehabilitative care.

[46] This court scrutinised the amounts claimed by the plaintiffs which was the maximum amount suggested by Dr Aishah. There are items like consultation with dietician which this court opines can be done at the government hospitals for free given that the need to consult is only twice yearly. That is the same reason why this court is also not granting damages for the cost of consultation with the ophthalmologist, dentist and spine orthopedic surgeon for scoliosis stabilisation. For these four areas, the frequency for check-ups required can be accommodated at the government hospitals which is only twice yearly respectively.

[47] Likewise, this court opines that consultation with the gynecologist which is required only yearly upon the age of maturity can also be done at government hospitals that provide such services for free or minimal amount. So, the surgical procedures for hysterectomy that the first plaintiff may require and also for the spine stabilisation for scoliosis can be done there. This court acknowledges that the government hospitals have also the necessary expertise and specialisation to treat the first plaintiff as required in relation to those areas.

[48] For the other medical areas, there is a necessity for the frequency and stability of the follow-ups as recommended to ease the first plaintiff's. Considering that costs and expenses increase as years go by and this quantum is awarded for the medical and rehabilitation needs for the first plaintiff for the remaining forty years of her life, this court grants the maximum amount claimed as follows:

Future General Damages – Medical and Therapy Needs	
Particulars	RM
Consultation with Rehabilitation Physician RM250 per visit — every three months	40,000
Consultation with Pediatric Neurologist RM250 per visit — every three months	40,000
Consultation with Pediatric Orthopedic Surgeon RM250 per visit — every four months	30,000
Consultation with Gastroenterologist RM250 per visit — every three months until adulthood	21,000
Consultation with Neurologist RM250 per visit — every three months until adulthood	21,000
Physiotherapy RM200 per visit — weekly	416,000
Home visit physiotherapy RM250 per visit — monthly	120,000

Occupational therapy RM200 per visit — weekly	416,000
Home visit occupational therapy RM200 per visit — monthly	96,000
Speech and language therapy RM200 per visit — monthly	96,000
TOTAL	1,296,000

[49] This court allows the claim for the surgery of the tendon release or osteotomy for the limb as there may be a need for the plaintiff to have the surgery on an urgent basis which is unlikely to be accommodated in the busy schedule of the government hospitals. As for the costs for hospital admissions, the plaintiff sought for once yearly. This court is minded to grant for the surgery for the tendon release and osteotomy and for once every two years instead. This is because even at four years of age, the first plaintiff had only been admitted to the hospital twice:

Future General Damages — Medical Surgeries	
Particulars	RM
Cost of surgical tendon releases or osteotomy for limb RM15,000 twice	30,000
Costs of hospital admissions RM10,000 for the two medical surgeries and another 20 times	220,000
TOTAL	250,000

[50] The total general damages awarded to the first plaintiff for future medical and therapy needs, and the medical surgeries is RM1,546,000.

Future general damages — Medicines and supplements

[51] There was no challenge as to the recommended medicines and supplements the first plaintiff will need. The only objection was to the cost of pneumococcal vaccine which is readily available for free at government hospitals/clinics. This court can agree to that. For the influenza A vaccine, the defendant had no objection to the cost but for only 17 years. This court will grant for 40 years as per the life expectancy of the first plaintiff. The following is the future general damages for medicines and supplements awarded to the first plaintiff:

Future General Damages — Medicines and Supplements	
Particulars	RM
Botulinum toxin	360,000

RM1,500 per vial three vials every six months	
Oral paracetamol RM4.20 per month	2,016
Oral fluimucil RM60 per week	124,800
Vitamin D3 RM720 per year	28,800
Vitamin C RM546 per year	21,840
Calcium RM1,500 per year	60,000
Influenza A immunization RM40 per year	1,600
TOTAL	599,056

Future general damages — Special equipment

[52] The first plaintiff now needs special equipment throughout her living years to enable her to cope with her condition. There are some reductions in terms of the amount claimed which this court opines reasonable taking into account a few suggestions by Dr Elyana for the defendant. The alternating pressure mattress was not in the list of Dr Aishah's recommendations. Nevertheless, this court opines that those are a necessity to prevent the first plaintiff from bed sores and the like. This is because the first plaintiff is unable to move the position of her body and needs the aid of her caregivers:

Future General Damages — Special Equipment	
Particulars	RM
Double Fowler Hi-lo hospital bed RM5,500 — renewal of four times given the wear and tear	27,500
Table for medicine	1 ,500
Wedges for lower limb positioning RM300 every three years	3,900
Orthotic Device hands and lower limbs RM1,000 per year for life	40,000
Standing frame RM15,000 for three renewal	45,000
Home rehabilitation equipment RM3,000 every five years	24,000
Portable ramps RM1,500 every five years	12,000

Electric Hoist RM13,000 every ten years	52,000
Tilt in space wheelchair with customised seating system RM6,000 every four years	60,000
Padded and reclining commode chair RM2,000 every five years	16,000
Shower Chair RM1,800 every five years	14,400
Alternating Pressure Mattress RM600 every three years	7,800
TOTAL	304,100

Future general damages — Consumables

[53] For personal care items, this court has awarded special damages at a rate of RM400 monthly. Taking inflation in the equation, this court calculates the quantum for future consumables at RM450 monthly is more than sufficient. This court opines that thermometer is a medical item every parent must have. As such, there is no order of costs for the thermometer. It was already awarded under special damages in any event. As to the pulse oximeter, RM350 every four years is on the extravagant side. From the COVID-19 pandemic, this court takes judicial notice that the reasonably good ones do not cost more than RM100. This court also reduces the cost claimed for the digital blood pressure machine by half:

Future General Damages — Consumable	
Particulars	RM
Hygiene care products, personal items RM450 monthly	216,000
Pulse oximeter	500
Digital blood pressure machine RM150 every four years, nine renewals	1,500
PEG tubes RM500 yearly	20,000
TOTAL	238,000

Future general damages — Others

[54] There were arguments on the cost of ambulance services claimed. This court opines with the very frequent therapies, consultations and home visits the first plaintiff will have, it is unnecessary to provide for ambulance costs twice yearly. This court opines all those will reduce the risks of emergencies. The first

plaintiff would be in close contact with her said purposes — at the hospitals/clinics and at home. As such, she will be monitored and observed.

[55] This court will also award future general damages for the purchase of multi-purpose vehicle that can accommodate the hydraulic wheelchair lift that can be used to ferry the first plaintiff to the hospitals if need be. For the said claim to purchase multi-purpose vehicle to care for the first plaintiff, this court has reduced the calculation for this as the residual amount of disposing of the vehicle when it is replaced is taken into account. The proceeds then can be used to add to the payment for the replacement vehicle.

[56] This court allows costs for respite care but not the amount claimed as the sum of RM4,000 yearly is reasonably sufficient. This would serve to benefit the plaintiffs. Another item that this court reduces to a reasonable amount is the cost of home remote monitoring by CCTV with mobile app monitoring. RM250 every two years for this is reasonably sufficient that can be installed with internet access as well.

[57] This court is satisfied that a full-time trained and qualified nurse is needed. However, this court is reluctant to accede to the claim for a maid. Dr Aishah's suggestion for a housemaid was on the basis of assistance as well as house chores. Clearly, this is the duty and obligation of the second plaintiff and her husband whether or not the first plaintiff suffers from cerebral palsy. The defendant cannot be taken advantage of for this purpose. This court also allows the value of care provided by family members at a reduced rate of RM500 per month as opposed to the rate calculated for special damages.

[58] With regards to the claim for a landed house with at least four bedrooms, this court has difficulty in granting the sum claimed for in toto. Firstly, it is the duty and obligation of the second plaintiff with her husband to ensure that they are equipped and able to provide for a family with three young, growing children. The defendant is only responsible to the extent that but for the first plaintiffs condition which was the result of its negligence, the family home need not a wheelchair friendly, accessible for caring a daughter with cerebral palsy and now, to also accommodate a caregiver and space to do her therapies. The family needs a more suitable place but to award a whole new landed property is not reasonable. Instead, this court awards a sum considered as judicious for the family to move into with the space required to care for the first plaintiff in her condition.

[59] The cost of holidays sought is not allowed as that is the responsibility of the second plaintiff and her husband whether or not the first plaintiff suffers cerebral palsy. This court also cannot accept a request for an alternative sum for an additional cost of holidays in the amount of RM2,500 yearly as there is no

evidence as to how that is for the first plaintiff because of the condition she suffers. She already has the necessary special equipment to help transport her.

[60] This court noted that the claim for accommodation and living expenses for the first plaintiff into adulthood had been factored in when calculating the other items. As such, the claim of RM624,000 is not allowed.

[61] With regard to the milk claimed at RM100 daily, this court finds that it is unreasonable to allow so. The second plaintiff and her husband have the responsibility to feed their child. The defendant is only liable to the extent of the difference with the special formula milk due to the first plaintiffs condition. Thus, the quantum is divided into half:

Future General Damages — Others	
Particulars	RM
Respite care RM4,000 yearly	160,000
Counseling for parents RM250 yearly	10,000
Qualified and trained nurse for full-time care RM4,000 monthly	1,920,000
Cost of home remote monitoring (by CCTV) RM250 every two years	5,000
Cost of suitable accommodation for care of first plaintiff	400,000
Cost of Multi-Purpose Vehicle — accommodate hydraulic wheelchair RM170,000 two renewal	510,000
Hydraulic wheelchair lift RM25,000 every ten years	100,000
Milk Peptamen RM50 daily	730,000
Future General Damages — Others	
Value of care provided by family members RM500 monthly	240,000
Accommodation and living expenses for the qualified and trained nurse RM400 monthly	192,000
TOTAL	4,267,000

Costs

[62] The defendant offered RM30,000 as costs. This suit though took 29 months to complete from the date when it was filed. The claim could have been settled even before the filing of this court action as the defendant had in their possession and knowledge of the internal findings.

[63] This court allows the claim of RM150,000 as costs for the first plaintiff and RM50,000 for the second plaintiff. This court also allows the plaintiffs' claim for out-of-pocket expenses of RM15,177.25. Collectively the costs awarded is RM215,177.25.

Total damages awarded

[64] To recap both the plaintiffs are awarded RM209,172 for special damages. For general damages, the first plaintiff is awarded RM500,000 and the second plaintiff RM114,000. Both the plaintiffs are awarded aggravated damages in the sum of RM350,000.

[65] For future general damages, the first plaintiff is awarded a total of RM6,954,156 for forty years. This court finds that a reasonable amount because on average her care amounts to RM173,853.90 per year.

[66] By virtue of the damages awarded to the plaintiffs, there will be no further claim for costs of future care of the first plaintiff against the defendant.

Interest

[67] This court grants the interest of 4% to be calculated on special damages of RM209,172 from 17 March 2019 to the date of admission of liability on 28 January 2022.

[68] Interest of 5% is to be calculated on general damages for pain and to RM964,000 from the filing of this action 23 November 2020 to the date of admission of liability on 28 January 2022.

[69] Interest of 5% on the total judgment sum of future general damages which is RM6,954,156 from the admission of liability 28 January 2022 to the date of payment.

Further orders

[70] To ensure that the future general damages is applied for the specific purposes iterated above, this court invokes its powers under O 76 r 12 of the Rules of Court 2012 ('the ROC'). The moneys must be employed for the purposes of the medical needs and care of the first plaintiff. It is not meant to

enrich any party or utilised for any other purpose, be it for the medical expenses of other family members.

[71] This court accordingly orders that:

(a) a bank account is opened dedicated to receiving the quantum of damages and to manage the moneys for the medical, rehabilitative needs and care of the first plaintiff as awarded. It would be under the joint names of the second plaintiff and her husband, the father of the first plaintiff;

(b) 50% of the judgment sum for future general damages must be deposited in an Islamic fixed deposit for the period of twenty years from the date the said judgment sum is received;

(c) an account of all the withdrawals and expenses spent must be maintained diligently and accordingly; and

(d) liberty is given to apply to vary any of the terms (a)–(c) above any time within a period of two years from today. Such application must be done and heard inter partes.

CONCLUSION

[72] It is indeed an expensive lesson for the defendant to learn but the amount cannot repair the damage done unto the first plaintiff. She will never have a taste of any decent normal living. The pain and suffering also extends to the second plaintiff and the rest of her family.

[73] The amount of damages awarded may at first instance looks like a fortune but when employed according to this court's order would only ensure some convenience to her survival.

Order accordingly.

Reported by Dzulqarnain Ab Fatar